



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **LON/00BH/HMG/2021/0036**

HMCTS code : **VIDEO**

Property : **124 Pretoria Avenue,
Walthamstow, London, E17 6JX**

Applicant : **(1) James Abella
(2) Mellissa Caronan**

Representative : **Ms Sherratt of Justice for Tenants**

Respondent : **Mr Michelson**

Representative : **Mr Sweeney**

Type of Application : **Application for a rent repayment
order by a tenant**

Tribunal Members : **Tribunal Judge Prof R Percival
Mr S Wheeler MCIEH, CEnvH**

**Date and venue of
Hearing** : **22 March 2022
Remote**

Date of Decision : **20 May 2022**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video using CVP. A face-to-face hearing was not practicable and all issues could be determined in a remote hearing.

Orders

(1) The Tribunal makes a rent repayment order against the Respondent and in favour of the Applicants in the sum of £9,860.

(2) The Tribunal orders under Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013, rule 13(2) that the Respondent reimburse the Applicants the application and hearing fees in respect of this application in the sum of £300.

The application

1. On 10 September 2021, the Tribunal received an application under section 41 of the Housing and Planning Act 2016 (“the 2016 Act”) for Rent Repayment Orders (“RROs”) under Part 2, Chapter 4 of that Act. Directions were given on 28 October 2021.
2. In accordance with the directions, we were provided with an Applicants’ bundle of 304 pages and a reply of 9 pages, and a Respondent’s bundle of 72 pages. The Respondent, outwith the directions, also provided a reply of 6 pages, which we accepted, with the agreement of the Applicants.

The hearing

Introductory

3. The applicants were represented by Ms Sherratt of Justice for Tenants. The Respondent was represented by Mr Sweeney, his partner.
4. The property is located in the London Borough of Waltham Forest. It is a two bedroom mid terrace house.

The alleged criminal offence

5. The Applicants allege that the Respondent was guilty of the having control of, or managing, an unlicensed house contrary to Housing Act 2004 (“the 2004 Act”), section 95(1). The offence is set out in section 40(3) of the 2016 Act as one of the offences which, if committed, allows

the Tribunal to make a rent repayment order under Part 2, chapter 4 of the 2016 Act.

6. It was agreed that the property was licensed under a previous selective licencing scheme effective in the relevant area of Waltham Forest until that scheme lapsed on 1 April 2020. The current selective licencing scheme came into effect on 1 May 2020. The applicant applied for a licence on 8 June 2021 (and accordingly from that date the criminal offence, if committed, ceased – section 95(3) of the 2004 Act).
7. The Respondent sought to persuade the Tribunal that he had a reasonable excuse for failing to licence the property under section 95(4) of the 2004 Act, in respect of which the burden is upon him (the standard of proof being that in civil proceedings).
8. Mr Michelson’s evidence was that he had emailed the local authority in March 2020 to enquire about renewing the licence. He had been told that he could not renew it as the scheme was coming to an end, and the new scheme started in May 2020. Following that, the Covid-19 lockdown took place.
9. Mr Michelson explained that the lockdown in France (where he and Mr Sweeney lived) had been more severe than that in England. That, combined with his fears for family members suffering from Covid-19, resulted in him forgetting to renew the licence at the appropriate time. He had, Mr Sweeney submitted, had an intention to renew, and but for Covid-19, he would have done so. Mr Sweeney also submitted that, being a one-property, unprofessional landlord resident overseas, he was highly reliant on his managing agent to remind him of such obligations.
10. We recognise, of course, the difficulties that Covid-19 created for very many people in this country and the world. However, even taking the pandemic into account, we do not consider that simple forgetting can properly constitute a reasonable excuse for failing to licence a house requiring a licence.
11. As to his reliance on his managing agents, we note the passage in *Aytan v Moore* [2022] UKUT 27 (LC), at [40], in which Judge Cooke does indicate that in some circumstances, the fact that a landlord lived abroad would be relevant to a reasonable excuse based on reliance on an agent, but, as she said, that is far from the starting point:

“... a landlord's reliance upon an agent will rarely give rise to a defence of reasonable excuse. At the very least the landlord would need to show that there was a contractual obligation on the part of the agent to keep the landlord informed of licencing requirements; there would need to be evidence that the landlord had good reason to rely on the competence and

experience of the agent; and in addition there would generally be a need to show that there was a reason why the landlord could not inform themselves of the licensing requirements without relying upon an agent, for example because the landlord lived abroad.

12. Here, there is no evidence of a contractual obligation, and no evidence of good reason to rely on the competence of the agent. Both, Judge Cooke suggests, should be satisfied before the question of an overseas resident landlord's need to rely on an agent becomes relevant.
13. *Decision:* We find, beyond a reasonable doubt, that the Respondent committed the offence in section 95(1) of the 2004 Act.
14. We conclude that we should make an RRO.

The total RRO possible

15. By sections 44(2) and (3) of the 2016 Act, the maximum possible RRO is the rent paid during a period of 12 months, minus any universal credit (or Housing Benefit – section 51) paid during that period.
16. The applicants were living together as a couple throughout the period, and were married in June 2021. The applicants applied for RROs in respect of the period from 6 June 2020 to 5 June 2021. The total amount of rent paid (by Mr Abella) during that period was £17,400. He received £973.28 in universal credit, giving a total possible RRO of £16,426.72. We understand the application to be a joint one, for an order to the benefit of both Applicants.
17. The Respondent did not contest the total rent paid.
18. *Decision:* The total possible RRO is £16,426.72.

The amount of the RRO

19. Section 44(4) provides that in determining the amount of an RRO, within the maximum, the Tribunal should have particular regard to the conduct of both parties, and to the financial circumstances of the landlord.
20. The Applicants moved into the property in May 2018. At the time, their two sons were aged one year and two years old. Ms Francisca Florendo, Ms Caronan's maternal aunt, stayed in the house for two extended periods. Ms Florendo originally came from the Philippines, but had moved to the UK in 1970. In January 2018, she had sold her house in London to retire to the Philippines. She came to stay, first, from July to October 2018, and secondly from March 2019 to June 2021.

21. We ordered, without opposition, that the Respondent's statement of case should stand as his examination in chief, there being no formal witness statement.
22. There were four main issues in content in relation to the parties' conduct raised in evidence.
23. The first related to Ms Forendo's stays. The Respondent's case was that these represented poor conduct on the Applicant's part.
24. Mr Abella's evidence was that Ms Forendo's the first visit was a normal family visit from a relative living overseas. The second had intended to come to an end in March 2020, but Ms Forendo was unable to return to the Philippines at that time because of the travel and other restrictions imposed as result of the Covid-19 pandemic. Ms Forendo did not contribute to the rent or other household bills, and was staying as a guest.
25. In cross examination, Mr Sweeney suggested to Mr Abella that he should have sought permission for Ms Forendo's stay. He referred to clause 7.2 of the tenancy agreement. That clause is under the heading "Assignment", and sets out, as on obligation on the tenant, "[n]ot to take in lodgers or paying guests or allow any person other than the person named as the Tenant in the Agreement to reside in the property without the written consent, which will not be unreasonably withheld". Mr Abella said she was a close family member, and referred to clause 8.1, which is under the heading "Use of the property", under which the tenant agrees "to use the Property only as a private residence for the occupation of the Tenant and his immediate family". Ms Forendo, he said, was not residing at the property, but visiting.
26. Mr Sweeney put it to Mr Abella that she had been there for 30 out of 37 months of the tenancy. Mr Abella said that that was not the whole tenancy, and reiterated that she had intended to leave in March 2020, and would have done so but for Covid-19.
27. The second issue relates to the smoke and carbon monoxide alarms, which the Applicant's say reflect badly on the Respondent's conduct.
28. It was Mr Abella's evidence was that the property did not initially have a smoke alarm on both floors, or carbon monoxide alarm. This was confirmed by an entry on the check-in inventory. Mr Abella said this was remedied about a year later.
29. It was put to Mr Abella in cross examination that there was a smoke alarm fitted above the boiler. Mr Abella said that he had been told there was one above the boiler, but there was not alarm upstairs. We note that the answer given in the check-in report was ambiguous as to

whether there were no smoke alarms, or that it was not the case that there were smoke alarms on both floors (ie, compatible with there being one, on the ground floor).

30. Thirdly, Mr Abella said there had been problems with mould and condensation in the property, representing disrepair that reflected badly on the Applicant. Mr Abella said he had raised the issue with the Respondent at the beginning of the tenancy, but the problem continued throughout the life of the tenancy.
31. The Respondent's evidence was that some work had been done to rectify such damp problems that there were, and there was an inspection report that minimised the problem and resulted in advice to the tenants by the consultant. At a later point, a dehumidifier was supplied. Another report recommended a ventilation system, although it seems this was not proceeded with during the currency of the tenancy.
32. Mr Sweeney put it to Mr Abella that over-occupation (ie by Ms Forendo) would have contributed to any problems with condensation. Mr Abella gave his view that it would not, as the condensation was already evident when they first moved in, and he had emailed to that effect. Mr Sweeney referred him to an email reply from the managing agent saying that there had not been previous complaints of condensation. Mr Abella said he was not able to say how or why the mould and condensation were caused, but they were evident.
33. Before submissions, Mr Wheeler, at Judge Percival's invitation, gave his preliminary view of the issue in relation to condensation, in order to allow the parties to take that into account when making their submissions. Mr Wheeler said that a property of this nature was at risk of condensation as a result of the age and nature of its construction, including single glazed windows and solid brick walls with poor thermal insulation, and that when there are two young children in a household, that raised the level of risk of precipitating such problems. The evidence suggested that there may have been some lack of ventilation by the tenants, but it was nothing dramatic. Mr Wheeler doubted that the ventilation system recommended would have been effective. In sum, there seemed to be little to occasion criticism of either the landlord or the tenants.
34. Finally, there was a dispute as to how much should have been withheld from the deposit at the end of the tenancy, which both parties relied on as a matter we should take into account in assessing the conduct of the other. In short, the tenants voluntarily agreed that £655 of the £2,175 deposit should be retained; the Respondent argued for a further £1,520; and the deposit scheme with which the deposit had been lodged (DPS) awarded the Respondent £103 extra.

35. The Applicant argued that the Respondent had improperly sought to withhold an excessive amount. The Respondent argued that the Applicants had done sufficient damage to justify their demand, and the deposit scheme adjudication was wrong.
36. The Respondent also said that his financial circumstances were such as to be relevant to the amount of an RRO.
37. The Respondent's evidence was that the property had been the Respondent's home until he moved in with Mr Sweeney in 2014. Now retired, he relied on the rental from the house as his only income. He was paying into a personal pension now (which would provide a modest income when he was 65), and had £11,520 in an ISA, which would go towards paying of the principal of the interest only mortgage (£161,000) in 2027. He produced two bank statements (May/June 2020 and March/April 2021) to support his evidence in relation to income.
38. In cross-examination, Mr Michelson said that he had a joint bank account with Mr Sweeney, but the income going into that account only came from Mr Sweeney. He agreed that he could use the bank account for ordinary expenditures in France, but he considered it to represent Mr Sweeney's money. That account had, he thought, a credit balance of about £18,000. There was also another Euro denominated joint account, which he never used. He had no idea how much money was in that account.
39. Ms Sherratt put to him an estimate provided by the Applicants of the value of the property, at £592,000. He said he would have to sell the property in due course because the mortgage was interest only.
40. In respect of the conduct of the parties, we conclude that there was no great fault on either side, for the reasons that follow.
41. As to Ms Forendo's stays, we doubt that the Applicants were in breach of clause 7.2 or 8.1. While Ms Forendo did stay for protracted periods, we accept the evidence that she was doing so a guest, who properly speaking resided elsewhere. Both clauses 7.2 and 8.1 provide limits on residence, not on accommodation as a guest. We reject Mr Sweeney's submission that a guest could only properly stay for a matter of weeks or a month. Many people living in London have family overseas. Extended visits lasting some months either way are not uncommon, and do not generally constitute "residence" at the accommodating premises. That is certainly true of Ms Forendo's first stay. We accept the evidence that her second stay was very significantly extended by the conditions imposed by the pandemic.

42. As Mr Wheeler indicated to the parties, we think it unlikely that Ms Forendo's presence had any measurable effect on the condensation problem.
43. Even if we are wrong, and the failure to apply for written permission was a technical breach of the tenancy, we do not think that it would make a great deal of difference in our assessment of the conduct of the parties. Written permission under clause 7.2 is not to be reasonably withheld, and, in the circumstances anticipated at the time that permission would have been sought, we think it likely that it would have been unreasonable to refuse it. And even if that is not the case, it is clear that the Applicants considered Ms Forendo to be a guest. If (contrary to our findings) they were wrong to do so, then such an error (ex hypothesi) would not have demonstrated significant turpitude.
44. As to the evidence in respect of the alarms, our finding of fact is that one smoke alarm was fitted throughout (over the boiler), and (as the parties agreed) a second smoke alarm and a carbon monoxide detector were fitted in May 2020.
45. That there were insufficient alarms for a period of a year (before the claim period) is a failing of some significance. It is mitigated by two factors. The first, objective one is that while fire and carbon monoxide poisoning are high impact risks in rented property, the likelihood of such risks eventuating is less in a house in single occupancy than in the more familiar situation of a house or flat self-contained flat in multiple occupation.
46. Secondly, we accept that, subjectively, the problem was rectified when it was discovered (albeit it should have been picked up earlier), and the primary fault lay with the managing agent. We do not think that Mr Michelson at any time sought to deliberately evade his legal responsibilities, even if he was over-reliant on the agent to secure that they were discharged. We note that for most of the period that the alarms were absent, the property was licensed, under the previous selective scheme.
47. As stated above, Mr Wheeler indicated the Tribunal's initial view as to the significance of condensation and mould, on the basis of the evidence. The parties submissions on the issue did not invite us to depart from those conclusions, and we do not do so. Properties of this age and type are prone to problems of condensation, which can and often do occur without significant fault on the part of either the landlord or the tenant. That is what happened here.
48. Both parties relied on the dispute over the deposit as indicating the poor conduct of the other. It is common for landlords and tenants to enter into disputes at the end of a tenancy in relation to deposits. Parliament has legislated to provide a means by which such disputes

are to be regulated and adjudicated. The parties went through that process here. We are not bound by the adjudication, and it is no doubt possible that disputes touching on a deposit may have an impact on the Tribunal's consideration of conduct under section 44(4). However, in this case, we conclude that this was what amounts to a routine deposit dispute that was dealt with under the system established to do so. We do not see it as providing us with any great material upon which to condemn the conduct of either party.

49. Our general conclusion, then, is that the conduct of the parties does not greatly impact one way or the other on our consideration of the amount of RRO that we should order.
50. In respect of the Respondent's means, we accept that there is some force in the Applicant's submission that there had been insufficient disclosure of the Respondent's financial circumstances. Ms Sherratt pointed to direction 11, which is concerned with the documentation required in the bundles. Direction 11(f) states that "[i]f reliance is placed on the landlord's financial circumstances, appropriate documentary evidence should be provided". Mr Michelson had not disclosed the two additional joint accounts in advance of cross-examination.
51. Nonetheless, we understood Mr Michelson's position in respect of those bank accounts. As to the first, Mr Michelson said that he considered the money in that account to be really Mr Sweeney's, and not his, albeit it was available to him to use if necessary. At one point, he referred to his own bank account representing his independence. As to the second, he said he never used it.
52. The accounts should have been disclosed. Not only are they resources that he has a right to use, but they are also clearly used, to a degree, for his support. We are entitled to infer that the euro denominated account is used, by Mr Sweeney, to pay for everyday expenses in France.
53. Nonetheless, as Mr Michelson indicated, we do not think that nowadays it is right to simply assume that the resources provided by one partner in a couple are to be treated as entirely the resources of the other, whether the couple are married or not. The broad picture remains that Mr Michelson, for his personal income, relies wholly on the rent from the property, even if he can also look to Mr Sweeney's resources to support him. We think that we should have *some* regard to this in coming to our conclusion as to the proper amount of the RRO.
54. Those are our conclusions as to the conduct of the parties and the landlord's financial circumstance. We turn now to some general points in relation to the quantum of the RRO.

55. We accept Mr Sweeney’s submission that the offence itself is not of the most serious. In particular, the property had been licensed, and was licensed again without major works being necessary to secure the licence. It is not a case where a landlord is avoiding licensing a property to avoid spending money on it.
56. Mr Sweeney’s submitted that Mr Michelson is not a “professional landlord”. We doubt that the identification of a binary distinction between those who are professional landlords and those who are not is of much assistance to the Tribunal in assessing the proper amount of an RRO. All landlords are responsible for ensuring that they discharge their legal responsibilities. Having said that, if a landlord with a large number of properties is not discharging its legal responsibilities, it is easier for the Tribunal to find a higher level of culpability (whether deliberate or negligent) than if the landlord is relying on the income from just one property. Clearly, Mr Michelson is at the latter end of the scale. We accept that Mr Michelson did genuinely intend to renew his licence, and that he did genuinely forget to do so, in the conditions of the pandemic. As we explained above, that does not amount to a defence of reasonable excuse, but it is relevant to the level of his culpability and the amount of the RRO.
57. In assessing the quantum of the RROs, we have taken account of the guidance in *Williams v Parmar and Others* [2021] UKUT 244 (UT), [2022] H.L.R. 8 and *Aytan v Moore* [2022] UKUT 27 (LC), and the cases referred to therein.
58. Weighing up these factors, we conclude that the RROs should be set at 60% of the maximum allowable. We have slightly rounded the exact figure below.
59. The Applicant applies for the reimbursement of the application and hearing fees. In the light of our decision to make an RRO, we also allow this application.

Disposal: We order an RRO in the amount of £9,860. We order the reimbursement of the Applicant’s application and hearing fees.

Rights of appeal

60. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the London regional office.
61. The application for permission to appeal must arrive at the office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

62. If the application is not made within the 28 day time limit, the application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at these reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
63. The application for permission to appeal must identify the decision of the Tribunal to which it relates, give the date, the property and the case number; state the grounds of appeal; and state the result the party making the application is seeking.

Name: Tribunal Judge Professor Richard Percival **Date:** 20 May 2022

Appendix of Relevant Legislation

Housing Act 2004

72 Offences in relation to licensing of HMOs

(1) A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under this Part (see section 61(1)) but is not so licensed.

Housing and Planning Act 2016

40 Introduction and key definitions

- (1) This Chapter confers power on the First-tier Tribunal to make a rent repayment order where a landlord and committed an offence to which this Chapter applies.
- (2) A rent repayment order is an order requiring the landlord under a tenancy of housing in England to –
- (a) repay an amount of rent paid by a tenant, or
 - (b) pay a local housing authority an amount in respect of a relevant award of universal credit paid (to any person) in respect of rent under the tenancy.
- (3) A reference to “an offence to which this Chapter applies” is to an offence, of a description specified in the table, that is committed by a landlord in relation to housing in England let to that landlord.

	<i>Act</i>	<i>section</i>	<i>general description of offence</i>
1	Criminal Law Act 1977	section 6(1)	violence for securing entry
2	Protection from Eviction Act 1977	section 1(2), (3) or (3A)	eviction or harassment of occupiers
3	Housing Act 2004	section 30(1)	failure to comply with improvement notice
4		section 32(1)	failure to comply with prohibition order etc
5		section 72(1)	control or management of unlicensed HMO
6		section 95(1)	control or management of unlicensed house

	<i>Act</i>	<i>section</i>	<i>general description of offence</i>
7	This Act	section 21	breach of banning order

- (4) For the purposes of subsection (3), an offence under section 30(1) or 32(1) of the Housing Act 2004 is committed in relation to housing in England let by a landlord only if the improvement notice or prohibition order mentioned in that section was given in respect of a hazard on the premises let by the landlord (as opposed, for example, to common parts).

41 Application for rent repayment order

- (1) A tenant or a local housing authority may apply to the First-tier Tribunal for a rent repayment order against a person who has committed an offence to which this Chapter applies.
- (2) A tenant may apply for a rent repayment order only if –
- (a) the offence relates to housing that, at the time of the offence, was let to the tenant, and
 - (b) the offence was committed in the period of 12 months ending with the day on which the application is made.
- (3) A local housing authority may apply for a rent repayment order only if –
- (a) the offence relates to housing in the authority’s area, and
 - (b) the authority has complied with section 42.
- (4) In deciding whether to apply for a rent repayment order a local housing authority must have regard to any guidance given by the Secretary of State.

42 Notice of intended proceedings

- (1) Before applying for a rent repayment order a local housing authority must give the landlord a notice of intended proceedings.
- (2) A notice of intended proceedings must—
- (a) inform the landlord that the authority is proposing to apply for a rent repayment order and explain why,
 - (b) state the amount that the authority seeks to recover, and (c) invite the landlord to make representations within a period specified in the notice of not less than 28 days (“the notice period”).
- (3) The authority must consider any representations made during the notice period.
- (4) The authority must wait until the notice period has ended before applying for a rent repayment order.

(5) A notice of intended proceedings may not be given after the end of the period of 12 months beginning with the day on which the landlord committed the offence to which it relates.

43 Making of a rent repayment order

- (1) The First-tier Tribunal may make a rent repayment order if satisfied, beyond reasonable doubt, that a landlord has committed an offence to which this Chapter applies (whether or not the landlord had been convicted).
- (2) A rent repayment order under this section may be made only on an application under section 41.
- (3) The amount of a rent repayment order under this section is to be determined with –
 - (a) section 44 (where the application is made by a tenant);
 - (b) section 45 (where the application is made by a local housing authority);
 - (c) section 46 (in certain cases where the landlord has been convicted etc).

44 Amount of order: tenants

- (1) Where the First-tier Tribunal decides to make a rent repayment order under section 43 in favour of a tenant, the amount is to be determined in accordance with this section.
- (2) The amount must relate to rent paid during the period mentioned in this table.

<i>If the order is made on the ground that the landlord has committed</i>	<i>the amount must relate to rent paid by the tenant in respect of</i>
an offence mentioned in row 1 or 2 of the table in section 40(3)	the period of 12 months ending with the date of the offence
an offence mentioned in row 3, 4, 5, 6 or 7 of the table in section 40(3)	a period, not exceeding 12 months, during which the landlord was committing the offence

- (3) The amount that the landlord may be required to repay in respect of a period must not exceed –
 - (a) the rent in respect of that period, less
 - (b) any relevant award of universal credit paid (to any person) in respect of rent under the tenancy during that period.

- (4) In determining the amount the tribunal must, in particular, take into account –
- (a) the conduct of the landlord and the tenant,
 - (b) the financial circumstances of the landlord,
 - (c) whether the landlord has at any time been convicted of an offence to which this Chapter applies.